

Communications Commission's ("FCC's") *Supplemental Order Clarification*,² does not provide BellSouth with unfettered discretion to conduct an audit of all circuits converted from special access to unbundled network element ("UNE") combinations of loop and transport ("EELs").

As the Georgia Public Service Commission ("Georgia Commission") already has found in reviewing these same issues and the same relevant Agreement provisions,³ BellSouth must demonstrate a concern prior to conducting an audit of particular converted circuits:

the Agreement requires BellSouth to demonstrate a concern prior to conducting an audit. Such a concern was required under relevant law at the time the parties negotiated the Agreement, and it does not contain any language indicating that the parties did not intend to contract with reference to existing law. Even if the Agreement were found to be ambiguous, which it is not, the evidence in the record demonstrates that the parties intended for BellSouth to have to demonstrate a concern prior to conducting an audit.⁴

The Georgia Commission also found that BellSouth must hire an independent auditor to conduct the audit in compliance with AICPA standards.⁵ In short, the Georgia Commission's decision

² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*").

³ BellSouth fails to set forth all relevant provisions of the Agreement in its complaint. As discussed herein, section 35.1 of the General Terms and Conditions requires the parties to comply with all applicable law, including "all applicable federal, state, and local statutes, rules, regulations, codes, effective orders, decision, injunctions, judgments, awards and decrees that relate to the obligations under this Agreement...." Agreement, General Terms and Conditions, § 35.1. Pursuant to section 23 of the General Terms and Conditions, the Agreement is "governed by, and construed and enforced in accordance with, the laws of the state of Georgia." Agreement, General Terms and Conditions, § 23. Under Georgia law, laws that exist at the time and place of the making of a contract, enter into and form a part of it and, although parties may stipulate for other legal principles to govern their contractual relationship than those prescribed by law, these exemptions must be expressly stated in the contract. The Agreement contains no express exemptions from the concern and independent auditor requirements established by the FCC in the *Supplemental Order Clarification*. In accordance with these provisions of the Agreement, these *Supplemental Order Clarification* requirements are incorporated into the Agreement as applicable law, and BellSouth is required to comply with them prior to proceeding with an audit. Sections 23 and 35.1 of the General Terms and Conditions are appended hereto as Exhibit A.

⁴ *Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Georgia Commission Docket No. 12778-U, Order Adopting in Part and Modifying in Part the Hearing Examiner's Recommended Order, at 8 (June 30, 2004) ("Georgia Order"). A copy of this Order is attached as Exhibit B.

⁵ *Id.* at 12-13.

vindicated NuVox’s rejection of BellSouth’s audit request on grounds that BellSouth had failed to demonstrate a concern⁶ (the Georgia Commission found that BellSouth eventually demonstrated a concern with respect to only a small number of circuits; however, BellSouth supplied billing materials that convinced the Georgia Commission of this only days before the Georgia Commission adopted its decision and more than two years after BellSouth filed its Georgia complaint), that the audit should be limited in scope (to a small subset of converted circuits – 44),⁷ and that the auditor BellSouth selected for the audit (the same auditor proposed in this case) was not acceptable.⁸

BellSouth has not complied with the requirements of the Agreement in this case, and, therefore, NuVox is not in violation of the Agreement. In this case, BellSouth neither has demonstrated a concern with respect to the converted circuits it seeks to audit nor has hired an independent auditor. Notably, even if BellSouth had satisfied these prerequisites to conducting an audit, BellSouth’s right to audit is limited to a review of the circuits for which it has demonstrated a concern. BellSouth cannot use the audit process as a fishing expedition to review each and every circuit where no concern exists.⁹

In sum, the Commission should dismiss or deny BellSouth’s complaint. After two years of litigation in Georgia, BellSouth knows what it must do in order to proceed with an audit of any of NuVox’s converted EEL circuits. If BellSouth demonstrates a concern with respect to a particular circuit, then NuVox will let a truly independent auditor (not the consulting shop BellSouth currently proposes) do an AICPA-compliant audit of any circuits for which

⁶ See *id.* at 5-8.

⁷ See *id.* at 11.

⁸ See *id.* at 12-14.

⁹ BellSouth seeks to audit converted circuits, not new EELs. It has no right to audit new EELs.

BellSouth demonstrates a concern. In the meantime, the Commission should not allow BellSouth to drain the Commission's resources or those of NuVox, while BellSouth reluctantly takes the steps necessary (if it proves it is so inclined to do so) to comply with the Agreement.

SPECIFIC RESPONSES

1. NuVox submits that no response is required to paragraph 1 of the complaint.
2. Subject to the clarification set forth above in the Preliminary Statement regarding the "nine-state Interconnection Agreement", NuVox admits the allegations set forth in paragraph 2 of the complaint.
3. NuVox submits that no response is required to paragraph 3 of the complaint.
4. NuVox admits the allegations set forth in paragraph 4 of the complaint.
5. Subject to the clarification set forth above in the Preliminary Statement regarding the "nine-state Interconnection Agreement", NuVox admits the allegations set forth in paragraph 5 of the complaint.
6. NuVox states that Section 15 of the Agreement speaks for itself and that no response is required to the first sentence of paragraph 6 of the complaint. NuVox admits that this complaint is within the Commission's jurisdiction. NuVox denies the remaining allegations set forth in paragraph 6 of the complaint. By way of further answer, NuVox disagrees with BellSouth's characterization of the dispute set forth in paragraph 6 of the complaint. In its complaint, BellSouth seeks to subject its auditing rights only to the provisions contained in Section 10.5.4 of the parties' Agreement. In addition to complying with the terms of Section

10.5.4, however, BellSouth's auditing rights and the Commission's resolution of any dispute arising under the Agreement are subject to the concern and independent auditor requirements set forth in the FCC's *Supplemental Order Clarification*, which are incorporated into the Agreement by operation of Georgia law and Section 35.1 of the General Terms and Conditions of the Agreement.¹⁰ The parties do not dispute that the Agreement is governed by Georgia law.¹¹ Section 35.1 of the General Terms and Conditions requires each party to comply with all applicable law.¹² Accordingly, as the Georgia Commission already has found, the concern and independent auditor obligations set forth in *Supplemental Order Clarification* are incorporated into the Agreement by operation of Georgia law and Section 35.1 of the General Terms and Conditions of the Agreement.¹³ The Agreement contains no exemption from these requirements and BellSouth has failed to comply with them.

7. NuVox admits the allegations set forth in paragraph 7 of the complaint.

8. NuVox admits the allegations set forth in paragraph 8 of the complaint.

9. NuVox denies the allegations set forth in paragraph 9 of the complaint. In

addition to the audit provision contained in Section 10.5.4 of Attachment 2 to the Agreement, BellSouth's audit request must comply with the FCC's *Supplemental Order Clarification* findings that: (1) audits will not be routine practice and only may be conducted under limited

¹⁰ See *Georgia Order* at 5-8 (stating that in the *Supplemental Order Clarification*, the FCC requires parties to demonstrate a concern and use an independent auditor to conduct the audit and that those requirements are incorporated into the parties' Agreement).

¹¹ Agreement, General Terms and Conditions, § 23 (stating "[t]his Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state of Georgia.").

¹² See Attachment 1: Agreement, General Terms and Conditions, § 35.1 (stating that each Party shall comply with "all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law....").

¹³ See *Georgia Order* at 5-8, 12-14.

circumstances and only when the incumbent local exchange carrier (“ILEC”) has a concern that a requesting carrier did not meet the qualifying criteria;¹⁴ and (2) such an audit must be performed by an independent third party.¹⁵

10. NuVox admits the allegations set forth in paragraph 10 of the complaint.

11. NuVox admits the allegations set forth in paragraph 11 of the complaint.

12. In response to paragraph 12 of the complaint, NuVox admits that approximately 159 circuits were converted to EELs in Kentucky.

13. NuVox admits the allegations contained in paragraph 13 of the complaint.

14. NuVox admits the allegations contained in paragraph 14 of the complaint.

By way of further answer, NuVox states that in the *Supplemental Order Clarification*, the FCC established three so-called “safe harbor” circumstances that allow requesting carriers to self-certify to incumbent LECs that they are complying with the FCC’s temporary use restrictions by providing a significant amount of local exchange service over the converted circuits.¹⁶ NuVox states that it was its general practice to self-certify to BellSouth that it provided a significant amount of local exchange service over the converted circuits through safe harbor Option 1.

15. NuVox lacks knowledge or information sufficient to admit or deny the statement set forth in paragraph 15 of the complaint. By way of further answer, NuVox states that it has requested traffic studies from BellSouth, but BellSouth has refused to provide NuVox with any traffic studies or other documentation supporting its allegation that “in the months leading up to March 2002, that the local exchange traffic passed from NuVox to BellSouth was

¹⁴ *Supplemental Order Clarification*, 15 FCC Rcd at 9603, ¶ 31 & n.86 (“[t]he incumbent LECs...state that audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange traffic...[w]e agree that this should be the only time that an incumbent LEC should request an audit.”).

¹⁵ *Id.* at 9604, ¶ 31.

¹⁶ *Id.* at 9598, ¶ 22.

inordinately low in Florida and Tennessee....” BellSouth has never alleged that NuVox exchanges a “low” level of local traffic with BellSouth in Kentucky.

16. In response to paragraph 16 of the complaint, NuVox admits that it received a letter from BellSouth dated March 15, 2002. NuVox denies that BellSouth’s letter, in and of itself, gives BellSouth the right to commence an audit under the Agreement. By way of further answer, NuVox states that BellSouth is required to demonstrate a concern and to hire an independent auditor prior to conducting an audit. BellSouth did not demonstrate a concern in its letter nor did it select an independent auditor, and BellSouth has not done so at any point since sending NuVox that defective notice letter.

17. NuVox admits the allegations contained in paragraph 17 of the complaint. By way of further answer, NuVox states that it has refused to permit BellSouth to conduct the audit because BellSouth has not complied with the prerequisites for conducting an audit, including demonstrating a concern for the circuits to be audited and hiring an independent auditor. Moreover, BellSouth inappropriately seeks to audit all converted circuits, not solely those circuits for which BellSouth now claims it has (but still has not demonstrated) a concern.

18. NuVox lacks knowledge or information sufficient to admit or deny the allegations set forth in paragraph 18 of the complaint.

19. NuVox lacks knowledge or information sufficient to admit or deny the allegations set forth in paragraph 19 of the complaint.

20. NuVox denies the allegations contained in paragraph 20 of the complaint. By way of further answer, NuVox states that BellSouth had not provided sufficient evidence in support of its allegation that NuVox is not providing a significant amount of local service on

each of the 44 circuits at issue in Georgia. NuVox lacks knowledge or information sufficient to admit or deny the allegations set forth in the last sentence of paragraph 20 of the complaint.

21. NuVox lacks knowledge or information sufficient to admit or deny the allegations set forth in paragraph 21 of the complaint.

22. NuVox lacks knowledge or information sufficient to admit or deny the allegations set forth in paragraph 22 of the complaint. By way of further answer, NuVox states that it has requested that BellSouth provide records or other documentation in support of its allegations, but, to date, BellSouth has refused to provide any documentary proof in support of its claims.

23. NuVox lacks knowledge or information sufficient to admit or deny the allegations set forth in the paragraph 23 of the complaint. By way of further answer, NuVox states that it has requested that BellSouth provide records or other documentation in support of its allegations, but, to date, BellSouth has refused to provide any documentary proof in support of its claims.

24. NuVox denies the allegations contained in paragraph 24 of the complaint. By way of further answer, NuVox states that BellSouth's tariffed special access rates may be applicable to circuits that do not comply with the significant local use requirement. BellSouth is not automatically entitled to rerate these circuits to special access rates on the basis of an incorrect certification. As stated above, the FCC specified three so-called safe harbor provisions that allow requesting carriers to self-certify to incumbent LECs that they are complying with the FCC's temporary use restriction. If a converted circuit does not qualify under the option pursuant to which it was certified, that converted circuit still might satisfy one of the remaining two safe harbors.

25. NuVox denies the allegations contained in paragraph 25 of the complaint.

26. NuVox denies the allegations contained in paragraph 26 of the complaint.

By way of further answer, under the Agreement, BellSouth must file a post-audit complaint with the Commission if it seeks redress as a result of the audit.¹⁷

27. NuVox denies the allegations contained in paragraph 27 of the complaint.

By way of further answer, as the Georgia Commission already has found, NuVox was and remains correct in insisting that BellSouth is required to demonstrate a concern and to retain an independent auditor prior to conducting an audit.¹⁸ BellSouth has done neither in this case. Moreover, BellSouth is not permitted to conduct a full-scale audit of all converted circuits; BellSouth may audit only those circuits for which it demonstrates a concern.¹⁹

28. NuVox denies the allegations contained in paragraph 28 of the complaint.

By way of further answer, as the Georgia Commission already has found, BellSouth is required to demonstrate a concern and to appoint an independent auditor to conduct the audit.²⁰ BellSouth has done neither in this case.

29. NuVox admits the first sentence of paragraph 29 of the complaint. By

way of further answer, contrary to BellSouth's allegation, as the Georgia Commission already has found, the Agreement incorporates the concern (which BellSouth seems to refer to in its Complaint as the "reason") and independent auditor requirements of the FCC's *Supplemental Order Clarification* and requires BellSouth to demonstrate a specific, bona fide and legitimately

¹⁷ See Agreement, Att. 2, § 10.5.4 ("[i]f, based on its audits, BellSouth concludes that [NuVox] is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in this Agreement").

¹⁸ See Georgia Order at 5-8, 14.

¹⁹ *Supplemental Order Clarification*, 15 FCC Rcd at 9603, at note 86; see also Georgia Order at 11.

²⁰ See *id.*; see also Georgia Order at 5-8, 14.

related concern that NuVox has not met the criteria to which it certified compliance.²¹ Indeed, BellSouth initially agreed with NuVox that the language of footnote 86 in the *Supplemental Order Clarification* required BellSouth to disclose to NuVox its concern that prompted the audit request.²² BellSouth still has not demonstrated a concern with respect to any converted EEL circuit in this case.

Because the *Supplemental Order Clarification* contemplates that audits will be rare and only undertaken for the purpose of pursuing a legitimate and rationally related concern regarding compliance, the audit must not begin prior to BellSouth demonstrating its specific concern with respect to each circuit at issue. BellSouth's lack of a specific, bona fide and legitimately related concern regarding NuVox's compliance on each circuit it seeks to audit demonstrates that BellSouth seeks an audit that is not permitted.

NuVox denies the remainder of the allegations set forth in paragraph 29 of the complaint. By way of further answer, NuVox states that the Agreement specifically imposes a requirement on BellSouth that BellSouth must demonstrate a concern prior to conducting an audit.²³

30. NuVox denies that BellSouth has selected an independent auditor. NuVox otherwise admits the allegations contained in the first sentence of paragraph 30. NuVox denies the allegations contained in the remainder of paragraph 30. By way of further answer, NuVox notes that in stating the allegation, BellSouth shifts from properly characterizing the dispute as being over the auditor's independence to whether both parties must agree on the choice of

²¹ *Id.*

²² The e-mail memorializing this conversation along with other relevant evidentiary material will be provided as part of the submission of the record and pleading materials from the Georgia Commission case.

²³ See Agreement, Att. 2, § 10.5.4; Agreement, General Terms and Conditions, 35.1 (stating that the parties are subject to all applicable federal and state law, which incorporates the *Supplemental Order Clarification*).

auditor prior to commencing the audit. BellSouth's sleight-of-hand, however, does not cure its failure to select an independent third party auditor. In the *Supplemental Order Clarification*, the FCC explicitly requires the auditor to be independent.²⁴ Moreover, the Georgia Commission agreed that the auditor must be independent and capable of performing an AICPA-compliant audit, and thus found that BellSouth's requested auditor was not acceptable.²⁵

BellSouth has proposed to use as auditor a consulting enterprise that is incapable of performing an AICPA-compliant audit on its own and that has demonstrated a lack of discretion and good judgment by engaging in private mid-audit conversations with BellSouth without the audited party present. An independent auditor simply would not privately seek BellSouth's help in conducting an audit. Yet, the record in the Georgia proceeding demonstrates that it did so. Moreover, the principals of BellSouth's proposed auditor each have had prior careers with ILECs and their present consulting shop has a client base that appears to be composed almost entirely of ILECs and ILEC affiliates. In addition, in its proposal to BellSouth, the proposed auditor touts its success in using audits to recover millions of dollars for its ILEC clients. These circumstances suggest a biased notion of what would constitute a "successful audit" and an overall bias that would be difficult to overcome, notwithstanding the best of intentions.

31. NuVox denies the allegations set forth in paragraph 31 of the complaint. Although there are several additional issues that NuVox would prefer to have resolved prior to initiation of an audit, NuVox and BellSouth previously agreed that they could be addressed in a state commission complaint filed by BellSouth, which is required under Section 10.5.4 of the

²⁴ *Supplemental Order Clarification*, 15 FCC Rcd at 9604, ¶ 31.

²⁵ See Georgia Order at 12-14 (stating that the "FCC has stated clearly not only that auditors must be independent but that the independent auditor must conduct the audit in compliance with AICPA standards.").

Agreement prior to BellSouth's taking action on any finding of non-compliance.²⁶ For example, BellSouth has stated its intention to reconvert to special access any circuit found not to be in compliance and to charge a special access nonrecurring charge for doing so. In such instance, BellSouth, however, only would be entitled to the same billing change charge that applied to the original conversion. In addition, NuVox has previously indicated its consent to BellSouth's assertion that BellSouth must pay for the cost of the audit and that any audit to be conducted will cost NuVox nothing. Based on the record developed in the Georgia case, the Parties, until recently, appeared to agree that BellSouth will pay for any audit, regardless of the results.

32. NuVox denies the allegations contained in paragraph 32 of the complaint. The record compiled before the Georgia Commission reveals that, in negotiating their interconnection agreement, the parties agreed to delete language that could have been interpreted to provide BellSouth with the "sole discretion" to conduct, and thus have an unconditional right to, an audit. Contrary to BellSouth's assertion that it has an "unconditional right" to audit NuVox's records, the FCC made clear in the *Supplemental Order Clarification* that BellSouth's right to audit is limited. The Agreement incorporates these aspects of the *Supplemental Order Clarification*. Specifically, the FCC found that: (1) audits will not be routine practice and may be conducted only under limited circumstances and only when the ILEC has stated a concern that the requesting carrier is not meeting the qualifying criteria; and (2) such an audit must be performed by an independent third party, which is hired and paid for by the ILEC.²⁷

²⁶ Section 10.5.4 of the Agreement provides that BellSouth may invoke the dispute resolution provisions of the Agreement and file a complaint with the Authority if an audit determines that certain circuits are not in compliance with the FCC's temporary use restriction.

²⁷ *Supplemental Order Clarification*, 15 FCC Rcd at 9587, ¶ 1; 9603, ¶ 31 & n.86.

CAUSES OF ACTION

33. NuVox incorporates its responses to paragraphs 1-32 as if set forth fully herein.

34. NuVox denies the allegations set forth in paragraph 34 of the complaint, to the extent that BellSouth claims that NuVox has breached or continues to breach the Agreement. NuVox admits that the Agreement is governed by Georgia law.

35. NuVox denies the allegations set forth in paragraph 35 of the complaint. By way of further answer, NuVox states that this complaint does not pertain to damages; the purpose of this complaint is solely to determine whether BellSouth is permitted to conduct an audit. If BellSouth were to seek any damages, pursuant to the Agreement, it would need to file a post-audit complaint.²⁸

36. NuVox denies the allegations set forth in the first sentence in paragraph 36 of the complaint. By way of further answer, BellSouth is not permitted to conduct an audit of all converted circuits. Further, as stated above, BellSouth is not permitted to conduct an audit of any circuit until BellSouth has demonstrated a concern, which it has not done. NuVox lacks knowledge or information sufficient to admit or deny the allegations contained in the second sentence of paragraph 36 of the complaint.

REQUEST FOR RELIEF

1. For the reasons stated above, NuVox requests that the Commission deny BellSouth's corresponding prayer for relief.

2. For the reasons stated above, NuVox requests that the Commission deny BellSouth's corresponding prayer for relief.

²⁸ See *supra* Note 29.

3. For the reasons stated above, NuVox requests that the Commission deny BellSouth's corresponding prayer for relief. The Commission should deny BellSouth's request for access to any and all records of its choosing, including records that contain customer proprietary network information (CPNI) and records that are carrier proprietary information (CPI). Under section 222 of the Communications Act of 1934, as amended (the "Act"), carriers only are permitted to use CPNI and CPI for the purpose of providing the telecommunications services requested. The information that BellSouth already has used – CPNI and NuVox CPI – and the information that BellSouth seeks to use – more CPNI and CPI (including third party CPI) – was provided solely for the purpose of BellSouth's provision of UNEs and other services. The purpose for which BellSouth intends to use CPNI and CPI is not permitted under the Act, and the Commission should not sanction BellSouth's misuse of CPNI and CPI.

4. NuVox requests that the Commission deny BellSouth's request for interest. Neither Section 10.5.4 of the parties' Agreement nor the *Supplemental Order Clarification* provide for interest. Moreover, as stated above, the issue of damages, if any, is not properly part of this proceeding.

5. For the reasons set forth above, NuVox requests that the Commission deny granting BellSouth any other relief.

AFFIRMATIVE DEFENSES

1. BellSouth's complaint is barred by the doctrine of collateral estoppel. The Commission applies the doctrine to avoid wasteful relitigation of issues necessarily determined in a prior proceeding. For example, in a recent case involving Kentucky-American Water Company, the Commission concluded that collateral estoppel barred a subsequent action on an issue previously considered, as long as four elements were satisfied:

the issues in the two proceedings are the same, the adjudicator in the previous proceeding reached a final decision or judgment on the merits of the case, the estopped party had a fair and full opportunity to litigate the issue, and the issue in the prior action was necessary to the adjudicator's final decision.²⁹

All four criteria are satisfied here. First, the issues considered by the Georgia Commission were identical to the issues raised in this proceeding. Specifically, the Georgia Commission already has concluded that the Agreement, which is governed by Georgia law, incorporates the concern and independent auditor requirements set forth in the *Supplemental Order Clarification*. The Georgia Commission also found that the *Supplemental Order Clarification* requires carriers to demonstrate a concern prior to conducting an audit, and, therefore, that BellSouth must demonstrate a concern prior to conducting an audit. The Georgia Commission also found that, under the Agreement, BellSouth must hire an independent auditor to conduct the audit.

Second, the Georgia Commission reached a final decision on the merits.³⁰ Third, all parties have had ample opportunity to fully litigate the issues of whether BellSouth was required to demonstrate a concern and whether BellSouth was required to hire an independent auditor. Fourth, the same cause of action – breach of contract – is present in both cases. In other words, the Georgia Commission's findings in that case were necessary to the Commission's

²⁹ *The Joint Petition of Kentucky-American Water Company, Thames Water Aqua Holdings GmbH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., Apollo Acquisition Company and American Water Works Company, Inc. for Approval of a Change of Control of Kentucky-American Water Company*, Order, Case No. 2002-00317, at 8 (Oct. 16, 2002) (finding that all four elements of issue preclusion were satisfied in that cases and that the principles of *res judicata* and collateral estoppel barred the Commission from litigating issues that already had been addressed absent changed conditions or circumstances) (citing *Newman v. Newman*, 451 S.W.2d 417 (1970)).

³⁰ See Georgia Order (rehearing and reconsideration sought by BellSouth on certain aspects and denied by Georgia Commission vote on August 17, 2004; clarification with respect to the scope of the Georgia Commission's proscription on the use of CPNI granted with certain caveats by Georgia Commission vote August 17, 2004).

ultimate decision in the proceeding. Furthermore, both BellSouth and NuVox were parties to the prior litigation. Accordingly, BellSouth's complaint is barred by the doctrine of collateral estoppel.

2. BellSouth's complaint is barred by the doctrine of *res judicata*. The doctrine of *res judicata* "bars the adjudication of issues that have already been litigated or should have been litigated in a prior case between the same or similar parties."³¹ The following elements must be satisfied for *res judicata* to apply: (1) identity of the parties; (2) identity of causes of action; and (3) the prior action was decided on the merits.³²

Each of the above-stated criteria is satisfied in this case. First, the parties are the same; both BellSouth and NuVox were the parties in the Georgia litigation. Second, the causes of action were the same, and third, the prior action was decided on the merits.

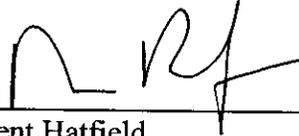
³¹ *The Joint Petition of Kentucky-American Water Company, Thames Water Aqua Holdings GmbH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., Apollo Acquisition Company and American Water Works Company, Inc. for Approval of a Change of Control of Kentucky-American Water Company*, Order, Case No. 2002-00317, at 7.

³² *Moore v. Commonwealth*, 954 S.W.2d 317, 318 (1997) (citing *Newman v. Newman*, Ky. 451 S.W.2d 417 (1970)).

WHEREFORE, NuVox respectfully requests that the Kentucky Public Service Commission dismiss or deny BellSouth's complaint and all of the relief sought forth therein.

Respectfully submitted,

NuVox Communications, Inc.



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Answer to the Complaint of BellSouth Telecommunications, Inc. was sent via U. S. mail, postage prepaid this 17th day of August, 2004 to the persons listed below.



Douglas F. Brent

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EXHIBIT A

AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., ("BellSouth"), a Georgia corporation, and TriVergent Communications, Inc. ("TCI"), a South Carolina corporation, on behalf of itself and its certificated operating affiliates identified in Part C hereof, and shall be deemed effective as of June 30, 2000. This Agreement may refer to either BellSouth or TCI or both as a "Party" or "Parties".

WITNESSETH

WHEREAS, BellSouth is an incumbent local exchange telecommunications company ("ILEC") authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, TCI is an alternative local exchange telecommunications company ("CLEC") authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, the Parties wish to resell BellSouth's telecommunications services and/or interconnect their facilities, for TCI to purchase network elements and other services from BellSouth, and to exchange traffic specifically for the purposes of fulfilling their applicable obligations pursuant to sections 251 and 252 of the Telecommunications Act of 1996 ("the Act").

NOW THEREFORE, in consideration of the mutual agreements contained herein, BellSouth and TCI agree as follows:

1.

Purpose

The resale, access and interconnection obligations contained herein enable TCI to provide competing telephone exchange service to residential and business subscribers within the territory of BellSouth. The Parties agree that TCI will not be considered to have offered telecommunications services to the public in any state within BellSouth's region until such time as it has ordered services for resale or interconnection facilities for the purposes of providing business and/or residential local exchange service to customers. Furthermore, the Parties agree that execution of this agreement will not preclude either party from advocating its position before the Commission or a court of competent jurisdiction.

BellSouth of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change.

- 21.3 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.
- 21.4 Execution of this Agreement by either Party does not confirm or infer that the executing Party agrees with any decision(s) issued pursuant to the Telecommunications Act of 1996 and the consequences of those decisions on specific language in this Agreement. Neither Party waives its rights to appeal or otherwise challenge any such decision(s) and each Party reserves all of its rights to pursue any and all legal and/or equitable remedies, including appeals of any such decision(s).
- 21.5 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of TCI or BellSouth to perform any material terms of this Agreement, TCI or BellSouth may, on fifteen (15) business days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within forty-five (45) business days after such notice, the Dispute may be referred to the Dispute Resolution procedure set forth in Section 12. In the event that the Parties reach agreement as to the new terms consistent with the above, the Parties agree to make the effective date of such amendment retroactive to the effective date of such Order consistent with this section, unless otherwise stated in the relevant Order.

22. **Waivers**

A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement.

23. **Governing Law**

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state of Georgia.

not in any way disparage or discriminate against the other Party or its products or services.

35. **Compliance with Applicable Law**

35.1 Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law, and nothing herein shall be deemed to prevent either Party from recovering its cost or otherwise billing the other Party for compliance with the Order to the extent required or permitted by the term of such Order.

35.2 Each Party shall be responsible for obtaining and keeping in effect all approvals from, and rights granted by, governmental authorities, building and property owners, other carriers, and any other persons that may be required in connection with the performance of its obligations under this Agreement. Each Party shall reasonably cooperate with the other Party in obtaining and maintaining any required approvals and rights for which such Party is responsible.

36. **Labor Relations**

Each Party shall be responsible for labor relations with its own employees. Each Party agrees to notify the other Party as soon as practicable whenever such Party has knowledge that a labor dispute concerning its employees is delaying or threatens to delay such Party's timely performance of its obligations under this Agreement and shall endeavor to minimize impairment of service to the other Party (by using its management personnel to perform work or by other means) in the event of a labor dispute to the extent permitted by Applicable Law.

37. **Compliance with the Communications Law Enforcement Act of 1994 ("CALEA")**

Each Party represents and warrants that any equipment, facilities or services provided to the other Party under this Agreement comply with CALEA. Each Party shall indemnify and hold the other Party harmless from any and all penalties imposed upon the other Party for such other Party's noncompliance, and shall at the non-compliant Party's sole cost and expense, modify or replace any equipment, facilities or services provided to the other Party under this Agreement to ensure that such equipment, facilities and services fully comply with CALEA.

38. **Arm's Length Negotiations**

This Agreement was executed after arm's length negotiations between the undersigned Parties and reflects the conclusion of the undersigned that this Agreement is in the best interests of all Parties.

EXHIBIT B

COMMISSIONERS:
H. DOUG EVERETT, CHAIRMAN
ROBERT B. BAKER, JR.
DAVID L. BURGESS
ANGELA ELIZABETH SPEIR
STAN WISE



RECEIVED

JUN 30 2004

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Docket No. 12778-U

12778
73946

In Re: Enforcement of Interconnection Agreement Between BellSouth
Telecommunications, Inc. and NuVox Communications, Inc.

ORDER ADOPTING IN PART AND MODIFYING IN PART THE HEARING
OFFICER'S RECOMMENDED ORDER

BY THE COMMISSION:

This matter arises from the May 13, 2002 Complaint by BellSouth Telecommunications, Inc. ("BellSouth") filed with the Georgia Public Service Commission ("Commission") against NuVox Communications, Inc. ("NuVox") to enforce the parties' interconnection agreement ("Agreement"). BellSouth asserts that it has the right under the parties' interconnection agreement to audit NuVox's records in order to confirm that NuVox is complying with its certification that it is the exclusive provider of local exchange service to its end users. The facilities that BellSouth wishes to audit were initially purchased as special access facilities but were subsequently converted to enhanced extended loops ("EELs") based on NuVox's self-certification that the facilities were used to provide a significant amount of local exchange service.

In construing the interconnection agreement, it is necessary to consider the June 2, 2000 order of the Federal Communications Commission ("FCC") in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 ("*Supplemental Order Clarification*"). The parties disagree both with respect to the meaning of the FCC order, and the extent to which the order was incorporated into the Agreement.

I. STATEMENT OF PROCEEDINGS

On May 13, 2002, BellSouth filed its Complaint to enforce the parties' Commission-approved interconnection agreement. The specific relief requested by BellSouth was that the Commission resolve the Complaint on an expedited basis, declare that NuVox breached the interconnection agreement by refusing to allow BellSouth to audit the facilities NuVox self-certified as providing "a significant amount of local exchange service," require NuVox to allow such an audit as soon as BellSouth's auditors are available and order NuVox to cooperate with the auditors selected by BellSouth. (BellSouth Complaint, pp. 5-6). NuVox filed with the Commission its Answer to the Complaint on May 21, 2002. NuVox supplemented its Answer on June 4, 2002.

A. Initial Assignment to Hearing Officer

In an effort to accommodate BellSouth's request for expedited treatment, the Commission assigned the matter to a Hearing Officer for oral argument. Oral argument took place before the Hearing Officer on August 13, 2002. BellSouth and NuVox filed their briefs on October 4 and October 7, 2002 respectively. Regarding whether an audit should be allowed to proceed, the relevant questions were whether BellSouth was required to demonstrate a concern that NuVox had not satisfied the criteria of its self-certification, and whether, if required, BellSouth had demonstrated such a concern. In the event that BellSouth was permitted to proceed with the audit, NuVox objected to the auditor BellSouth intended to use charging that the auditor was not independent.

On November 5, 2002, the Hearing Officer issued an Order Denying Request to Dismiss, Deny or Stay Consideration, Denying Request to Enter an Order that the Interconnection Agreement has been Breached and Granting Request to Audit. The Hearing Officer determined that it was not necessary to reach the issue of whether BellSouth was required to demonstrate a concern because BellSouth did show that it had a concern. (November 5, 2002 Order, p. 5). The Hearing Officer based this conclusion upon BellSouth's allegations that records from Florida and Tennessee indicated that in those states an inordinate amount of the traffic from NuVox was not local. *Id.* at 8. BellSouth had asserted that, because most customers generate more local than toll calls, if NuVox were the exclusive provider, it would be expected that a significant percentage of the carrier's traffic would be local. (BellSouth October 4, Brief, p. 10). Yet, according to BellSouth, its records reflected that local traffic constituted only 25% of its traffic in one state. *Id.* at 11. An additional issue raised by NuVox was whether the auditor BellSouth intended to use, American Consultants Alliance ("ACA"), was independent. The Hearing Officer rejected NuVox's charges that ACA was not independent. (Hearing Officer's November 5, 2002 Order, pp. 8-10).

On November 26, 2002, NuVox applied to the Commission for review of the Hearing Officer's decision. NuVox challenged both the Hearing Officer's conclusions that BellSouth demonstrated a concern and that the auditor was independent. (NuVox Application, p. 2). Finding that questions remained essential to the resolution of the issues, the Commission remanded the matter to a Hearing Officer for an evidentiary hearing on "whether BellSouth was obligated to demonstrate a concern prior to being entitled to conduct the requested audit of NuVox, whether BellSouth demonstrated a concern and whether the proposed auditor is independent." (Remand Order, p. 2).

B. Second Assignment to a Hearing Officer

As a preliminary matter, the Hearing Officer denied NuVox's request for discovery and request that the dates for this proceeding be based upon the date on which the FCC releases the Triennial Review Order. (Procedural and Scheduling Order, p. 2). On October 17, 2003, an evidentiary hearing was held before the Hearing Officer. NuVox and BellSouth filed briefs on December 23, 2003 and December 29, 2003 respectively. On February 11, 2004, the Hearing Officer issued his Recommended Order on Complaint ("Recommended Order").

The Hearing Officer first determined that BellSouth was obligated to demonstrate a concern. The Hearing Officer based this conclusion upon evidence that in negotiating the interconnection agreement the parties were cognizant of the *Supplemental Order Clarification* and that the language of the interconnection agreement does not make it exempt from the requirements of this order to show a concern. (Recommended Order, pp. 8-9).

The Hearing Officer next determined that BellSouth demonstrated a concern that NuVox is not the exclusive provider of local exchange service. *Id.* at 9-10. This conclusion was based on BellSouth's identification of forty-four EELs in Georgia that NuVox is using to provide local exchange service to end users who the Hearing Officer found also receive local exchange service from BellSouth. *Id.* at 9.

The Hearing Officer then found that BellSouth's proposed auditor is an independent third party auditor as required by the *Supplemental Order Clarification* and the Agreement. The Hearing Officer concluded that the evidence did not demonstrate that ACA was subject to the control or influence of, associated with or dependent upon BellSouth. *Id.* at 11. The Hearing Officer determined that neither the interconnection agreement nor the *Supplemental Order Clarification* requires that the auditor comply with American Institute of Certified Public Accountants ("AICPA") standards; therefore to the extent NuVox insists upon the proposed auditor's adherence to those standards, NuVox should bear the additional costs. *Id.*

C. Petitions for Review of the Recommended Order

On March 12, 2004, NuVox filed its Objections to and Application for Commission Review of Recommended Order on Complaint. On this same date, BellSouth filed its Petition for Review of Recommended Order.

NuVox raised numerous grounds of disagreement with the Hearing Officer's Recommended Order. First, NuVox argued that the Hearing Officer erred in finding that BellSouth demonstrated a concern. As a preliminary matter, NuVox argued that BellSouth's notice was deficient because BellSouth didn't have a concern at the time it notified NuVox of its intent to audit. (Objections, p. 2). NuVox also contended that BellSouth did not include any evidence to support the Hearing Officer's conclusion that NuVox does not provide a significant amount of local exchange service to a number of customers NuVox serves via EELs. *Id.* at 5. NuVox charged that the Hearing Officer erred in finding that BellSouth supplied evidence demonstrating BellSouth provides local exchange services to thirty or so NuVox customers served by forty-four converted EELs in Georgia. *Id.* at 6.

The second component of the Recommended Order that NuVox takes issue with is the conclusion that BellSouth is entitled to audit all of NuVox's EELs in Georgia. NuVox stated that the scope of the audit, if approved, should be limited to those circuits for which BellSouth has demonstrated a concern. (Objections, p. 16). NuVox argued that BellSouth's alleged concern is customer and circuit specific. *Id.* at 17. NuVox also relied upon the *Supplemental Order Clarification* to support a narrower scope for any audit. The *Supplemental Order Clarification* permits only limited audits that will not be routine. (Objections, p. 17, citing to *Supplemental Order Clarification*, ¶¶ 29, 31-32).

NuVox also argued that the Hearing Officer erred in concluding that the proposed auditor is independent. The standard used by the Hearing Officer for independence was that the auditor could not be subject to the control or influence of, associated with or dependent upon BellSouth. (Recommended Order, p. 11). While NuVox did not find fault with this standard, it argued that the Hearing Officer misapplied the standard in this instance. NuVox contended that admissions by BellSouth's witness of discussions with the proposed auditor concerning matters such as the *Supplemental Order Clarification* and other audits reveal that ACA is subject to the influence of BellSouth. (Objections, p. 19). NuVox also claimed that ACA received training from BellSouth, and consulted with BellSouth during audits. *Id.* at 20.

Finally, NuVox requested that the Commission stay the order should it be determined that BellSouth may proceed with the audit. NuVox asserts that it will be irreparably harmed by such a Commission order. (Objections, p. 22).

BellSouth raised two points in its Petition for Review of Recommended Order. First, BellSouth requested that the Commission clarify that BellSouth is authorized to provide the auditor with records in BellSouth's possession that contain proprietary information of another carrier. BellSouth argued that review of this information is likely to uncover additional violations by NuVox. (Petition, p. 3). BellSouth argued that such records include information that may not be subject to disclosure absent an order from a regulatory agency. *Id.*

The second argument raised by BellSouth in its Petition is that the Hearing Officer erred in finding that BellSouth is required to demonstrate a concern before conducting an audit. BellSouth asserted that the *Supplemental Order Clarification* only requires that incumbent local exchange carriers ("ILECs") have a concern, not that such a concern be stated or demonstrated. In addition, the parties' interconnection agreement does not include this requirement that BellSouth demonstrate a concern, and differs from the federal law on other aspects of the audit. (Petition, pp. 11-12).

II. JURISDICTION

The Commission has general jurisdiction over this matter pursuant to O.C.G.A. §§ 46-2-20(a) and (b), which vests the Commission with authority over all telecommunications carriers in Georgia. O.C.G.A. § 46-5-168 vests the Commission with jurisdiction in specific cases in order to implement and administer the provisions of the Georgia's Telecommunications and Competition Development Act of 1995 ("State Act"). The Commission also has jurisdiction pursuant to Section 252 of the Federal Telecommunications Act of 1996 ("Federal Act"). Since the Interconnection Agreement between the parties was approved by Order of the Commission, a Complaint that a party is in violation of the Agreement equates to a claim that a party is out of compliance with a Commission Order. The Commission is authorized to enforce and to ensure compliance with its orders pursuant to O.C.G.A. §§ 46-2-20(b), 46-2-91 and 46-5-169. The Commission has enforcement power and has an interest in ensuring that its Orders are upheld and enforced. Campaign for a Prosperous Georgia v. Georgia Power Company, 174 Ga. App. 263, 264, 329 S.E.2d 570 (1985).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. BellSouth is required to demonstrate a concern.

The first issue to address is whether BellSouth was required to demonstrate a concern that NuVox is not satisfying the terms of its self-certification. If the Commission were to determine that BellSouth need not demonstrate a concern, then it becomes a moot question as to whether BellSouth did, in fact, present evidence adequate to show that it has a concern. If the Commission determines that BellSouth must make such a showing, then the Commission must turn its attention to the evidence in the record.

There are two questions that must be answered in determining whether BellSouth must show a concern. The first question is whether the *Supplemental Order Clarification* requires that an ILEC demonstrate a concern prior to conducting this type of audit. If this question is answered in the affirmative, the next question is whether the parties' interconnection agreement opts out of this requirement.

The Commission Staff ("Staff") recommended that the Commission determine that BellSouth was required to demonstrate a concern. The *Supplemental Order Clarification* requires that the ILEC demonstrate a concern prior to conducting an audit. The *Supplemental Order Clarification* states that audits should only take place when the ILECs have a concern. (*Supplemental Order Clarification*, ¶ 31, n.86). This reading of the Supplemental Clarification Order is reinforced by the *Triennial Review Order*, which states as follows:

Although the bases and criteria for the service tests we impose in this order differ from those of the Supplemental Order Clarification, we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based upon self-certification, subject to later verification based upon cause, are equally applicable.

(*Triennial Review Order*, ¶ 622).

This language eliminates any ambiguity over whether the above-cited footnote in the *Supplemental Order Clarification* was intended to make the demonstration of a concern a mandatory pre-condition of these audits. Not only does the *Triennial Review Order* provide that ILECs must base audits on cause, but it states that this principle is shared by the *Supplemental Order Clarification*. At the time the parties negotiated their interconnection agreement, federal law required that BellSouth demonstrate a concern prior to conducting an audit.

BellSouth's argument that at most ILECs only have to "have" a concern, rather than an obligation to state or demonstrate the required concern has no merit. Such a construction would render meaningless the FCC's requirement. A construction that would allow BellSouth to meet the concern requirement, without so much as stating what that concern is, sets the bar unacceptably low.

Having concluded that the *Supplemental Order Clarification* requires that BellSouth demonstrate a concern, it is necessary to examine the parties' interconnection agreement. No one disputed that BellSouth and NuVox were free to contract to terms and conditions that were different than what is set forth in the *Supplemental Order Clarification*. The parties disagree over whether that was what they did.

Under Georgia law, parties are presumed to enter into agreements with regard to existing law. *Van Dyck v. Van Dyck*, 263 Ga. 161, 163 (1993). If parties intend to stipulate that their contract not be governed by existing law, then the other legal principles to govern the contract must be expressly stated therein. *Jenkins v. Morgan*, 100 Ga. App. 561, 562 (1959). The parties' interconnection agreement does not expressly state that the parties stipulated that the contract would be governed by principles other than existing law. To the contrary, the parties agreed to contract with regard to applicable law:

Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law, and nothing herein shall be deemed to prevent either Party from recovering its cost or otherwise billing the other party for compliance with the Order to the extent required or permitted by the term of such Order.

(Agreement, General Terms and Conditions, § 35.1).

As stated above, the federal law provides that BellSouth must demonstrate a concern prior to proceeding with an audit. With respect to audits, the Agreement included the following provision:

BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] records not more than on[c]e in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on its audits, BellSouth concludes that [NuVox] is not providing a significant amount of local exchange traffic over the combination of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from [NuVox].

(Agreement, Att. 2, § 10.5.4).

BellSouth emphasized that parties may voluntarily agree to terms and conditions that would not otherwise comply with the law. (BellSouth Petition, p. 6). BellSouth argued that the parties negotiated specific terms and conditions for audits, and that pursuant to federal law, these are the terms and conditions that should govern their audit rights. *Id.* Specifically, BellSouth attacked NuVox's reliance on the Georgia Supreme Court's decision in *Van Dyck*, which involved the "automatic proration" of alimony or child support. The Court in *Van Dyck* concluded, *inter alia*, that because some sections of the parties' contract provided for "automatic proration" based on contingent events, the parties' failure to include the same language in the section under dispute meant that no such "automatic proration" was intended in relation to that section. *Van Dyck*, 263 Ga. at 164. BellSouth points out that NuVox and BellSouth expressly reference the *Supplemental Order Clarification* at times in the Agreement, but not with respect to the audit rights. (BellSouth Petition, p. 11). BellSouth reasons that *Van Dyck* therefore supports its position. *Id.*

BellSouth's analysis overlooks a key distinction between this case and *Van Dyck*. In *Van Dyck*, the applicable law prohibited "automatic proration," except as specifically provided for in the decree. *Van Dyck*, 263 Ga. at 163. The provision in dispute in that case did not specifically provide for "automatic proration," and the Court did not construe the provision to allow for such a proration. *Id.* Therefore, the Court found that the agreement did not reflect the intent to differ from applicable law. In contrast, BellSouth asks this Commission to conclude that the relevant law does not apply to this section of the Agreement. It is one thing to say an agreement that specifies a variance from existing law in one section reflects intent to follow existing law in a different section where no such specification is made; it is quite another to conclude that an agreement that specifies compliance with existing law in one section reflects intent to vary from existing law where no such specification is made.

BellSouth also argues that the *Jenkins* decision favors its position because the Agreement sets forth the "legal principles to govern" the terms of the audit. (BellSouth Petition, p. 12). BellSouth states that the parties agreed that the Agreement "contains language making the giving of 30 days' notice the only precondition that must be satisfied before BellSouth can conduct an audit." *Id.* The Agreement, however, does not state that the notice is the only precondition. The Agreement does not address the requirement to demonstrate a concern, and that is the specific issue in dispute. Without language evidencing intent to vary from the requirement to show a concern, it is unreasonable to conclude that NuVox intended to waive its protection under federal law.

Unless a contract is ambiguous, the finder of fact need not look any further than the language in the agreement to determine the intent of the parties. *Undercofler v. Whiteway Neon Ad, Inc.*, 114 Ga. 644 (1966). An agreement cannot be deemed ambiguous until "application of the pertinent rules of interpretation leaves it uncertain as to which of two or more possible meanings represents the true intention of the parties." *Crooks v. Crim*, 159 Ga. App. 745, 748 (1981). Construing the contractual provision in question in accordance with well-established rules of construction results in the conclusion that BellSouth is obligated to demonstrate a concern. Even if the Commission were to find the contract ambiguous, the evidence of intent

presented at the hearing supports NuVox's arguments that the parties intended for BellSouth to be obligated to show a concern prior to conducting an audit.

NuVox sponsored the testimony of Hamilton Russell, one of the NuVox employees personally responsible for negotiating the interconnection agreement. Mr. Russell testified that, during the negotiation process, the parties discussed the "concern" requirement, and that the parties agreed that BellSouth must state a valid concern prior to initiating an audit. (Tr. 278). Mr. Russell testified further that the parties agreed to strike the language proposed by BellSouth that would have allowed BellSouth to conduct the audit at its "sole discretion." (Tr. 278). The interconnection agreement does not provide that BellSouth may conduct an audit at its sole discretion, but remains silent on the "concern" requirement. Had language allowing BellSouth to conduct the audit at its sole discretion been incorporated into the final Agreement, then it may have withstood the presumption that the parties intended to contract with reference to existing law. That such language was proposed, and that NuVox balked at its inclusion, supports a finding that the parties agreed to follow the existing law as set forth in the *Supplemental Order Clarification*.

The Commission adopts the Staff's recommendation that the Agreement requires BellSouth to demonstrate a concern prior to conducting an audit. Such a concern was required under relevant law at the time the parties negotiated the Agreement, and it does not contain any language indicating that the parties did not intend to contract with reference to existing law. Even if the Agreement were found to be ambiguous, which it is not, the evidence in the record demonstrates that the parties intended for BellSouth to have to demonstrate a concern prior to conducting an audit.

B. BellSouth demonstrated a concern.

The Hearing Officer correctly explained that a concern "cannot be so speculative as to render the FCC's requirement meaningless, nor can the standard for determining whether a concern exists be so high as to require an audit to determine if such a concern exists." (Recommended Order, p. 9). Neither party disputed this standard.

In its effort to demonstrate a concern, BellSouth presented evidence of forty-four EELs in Georgia that NuVox is using to provide local exchange service to end users who also receive local exchange service from BellSouth. (Tr. 96-98, BellSouth Exhibit 2 (proprietary)). BellSouth compared the name and location of each NuVox end user customer served by EEL circuits with BellSouth end user records and discovered forty-four EELs in Georgia that NuVox is using to provide local exchange service to end users that are also receiving local exchange service from BellSouth.¹ (Tr. 98). BellSouth argued that NuVox cannot be the exclusive provider of local exchange service to an end user that also receives this service from BellSouth. (Tr. 98).

¹ In her prefiled direct testimony, Ms. Padgett stated that BellSouth had identified at least forty-five circuits. This number was subsequently amended to forty-four. (See BellSouth's Post-Hearing Brief, p. 21).

NuVox argued that BellSouth's evidence does not show that BellSouth provides local exchange service to customers of NuVox served via converted EELs. (NuVox Post-Hearing Brief, p. 36). Through cross-examination of BellSouth's witness, NuVox explored several reasons that the customers alleged to be receiving local exchange service from BellSouth were not, in fact, receiving such service. NuVox asserted that (1) the numbers for the customers identified as BellSouth end users generated a "not active" or "this number has been disconnected" recording when called; (2) the name of the BellSouth's customer was different than the name of the customer served by NuVox; (3) the address of BellSouth's end user was different than the address for NuVox's customer; and (4) certain numbers when dialed "ring to a computer or modem," which, according to NuVox, means the customer is receiving DSL and not local exchange service. Tr. at 164, 167-168, 173, 180-183.

BellSouth witness Ms. Padgett testified that there were explanations for each of NuVox's assertions. First, Ms. Padgett testified that NuVox may have gotten a "not active" or "this number has been disconnected" recording for certain BellSouth customers because it appeared NuVox was dialing the wrong number or was dialing the billing number, which is not a valid telephone number. (Tr. 233-234). Ms. Padgett explained that differences in customer names may be the result of the same customer going by two different names. (Tr. 169-170). The same is true for differences in customer addresses, which can be explained by the customer's use of a "different naming convention" when establishing service. (Tr. 175-176). An alternative explanation for a difference in address may be that the customer receives service at one address but has bills sent to a different address. (Tr. 236). Ms. Padgett also testified that digital subscriber line ("DSL") service works on the high frequency portion of a loop, while telephone service works on the low frequency portion. (Tr. 236). If the telephone number of an end user who receives DSL service is dialed, the call would still be completed. (Tr. 236). The Hearing Officer concluded that Ms. Padgett's explanations were reasonable. (Recommended Order, p. 10).

In its Objections to and Application for Review of the Recommended Order, NuVox states that BellSouth did not "prove" that it was providing local exchange service to the end use customers in question. (See Objections, p. 9 "does not constitute proof that BellSouth provides local service," p.10 "BellSouth Exhibit 2 cannot reasonably be found to constitute proof that BellSouth provides local service . . ."). NuVox also states that "it has never been established" that BellSouth provides service to these customers. *Id.* at 7. In making these arguments, NuVox sets the "concern" standard unreasonably high. The stated purpose of BellSouth's audit is to examine whether NuVox is complying with its certification as the exclusive provider of local exchange service. If the "concern" requirement was construed to require BellSouth to prove that NuVox was not the exclusive provider of service in order to conduct such an audit, then no audit would be necessary in the event the concern was satisfied. To state that BellSouth cannot conduct an audit unless it proves its case prior to conducting an audit is effectively stripping BellSouth of any audit rights it has under the Agreement.

BellSouth presented the Commission with evidence that supported that it had a concern that NuVox was not the exclusive provider of local exchange service. NuVox questioned the evidence, and BellSouth provided credible explanations in response to those questions. NuVox charges that these explanations were mere speculation, and that BellSouth's witness did not have

actual knowledge that these explanations were accurate. (Objections, pp. 12-13). Again, the issue is not whether BellSouth can demonstrate with certainty that NuVox is in violation of the safe harbor provision, but rather, that it has a legitimate concern. By providing credible explanations for the questions raised by NuVox, BellSouth satisfies this requirement. It is reasonable to conclude that BellSouth has stated the necessary concern.

The Commission concludes that BellSouth has submitted sufficient evidence to demonstrate a concern that NuVox is not the exclusive provider of local exchange service to a number of customers served via converted EELs. The Commission emphasizes that the determination that the concern requirement was satisfied is fact-specific.

The Staff recommended that the Commission reject Nuvox's argument that BellSouth should have to re-file the notice of its intent to conduct an audit. The Agreement provides BellSouth may proceed with an audit upon thirty days notice. (Agreement, Att. 2, § 10.5.4). BellSouth initially relied upon data from Tennessee and Florida related to the division between local and toll calls. On remand, BellSouth raised a separate concern related to forty-four converted circuits in Georgia. NuVox argued that, because the notice issued related to the initial concern, BellSouth failed to meet this requirement in the Agreement. (Objections, pp. 2-3).

NuVox received ample notice of the concern raised by BellSouth during the remanded proceeding to the Hearing Officer. It cross-examined BellSouth extensively on the alleged concern. It sponsored witnesses to rebut the allegations of BellSouth. It briefed the issues before the Commission. The apparent intent of the notice requirement in the Agreement is to protect NuVox from BellSouth commencing an audit without NuVox having any opportunity to challenge the concern, raise any objection or otherwise prepare in an effort to minimize the disruption to its business that an audit would cause. That this order is being released two years after BellSouth filed its Complaint in this docket indicates that NuVox has not lacked for preparation. NuVox has not cited to anything that the Agreement requires as to the form of the notice. As BellSouth points out, "no particular form of written notice is required." (BellSouth Response to NuVox Objections, p. 2). Because NuVox has been on notice for more than thirty days that BellSouth intended to audit based on the concern raised with the forty-four converted circuits, allowing BellSouth to proceed with an audit without serving additional notice upon NuVox meets both the spirit and the letter of the Agreement. Furthermore, NuVox's argument is based on the incorrect premise that BellSouth's initial concern was determined to be inadequate. That is not the case. The Commission remanded the matter for an evidentiary hearing once it determined that there were significant questions of fact remaining without any evidentiary hearing.

The Commission adopts the Staff's recommendation that BellSouth satisfied the concern requirement in the Agreement. In relation to BellSouth's showing of a concern, the Staff recommended that to the extent the Recommended Order concludes that BellSouth was providing service to EELs for which NuVox has contended it is the exclusive provider, that finding should be modified to state that the Commission finds BellSouth has provided evidence indicating that it may be providing such service. The Commission does not need to reach the question of whether BellSouth is providing this service until BellSouth presents the results of ACA's audit. The Commission adopts the Staff's recommendation on this issue.

C. The scope of the audit should be limited to the forty-four EELs for which BellSouth demonstrated a concern.

The Recommended Order states that the audit should apply to all EELs. (Recommended Order, p. 10). The Staff recommended that the Commission limit the scope of the audit to converted EELs because such an order was consistent with the relief sought in BellSouth's complaint. In other words, the relief granted by the Hearing Officer on this issue surpassed the relief that BellSouth had requested.

NuVox argued that the scope of the audit should be limited to the circuits for which BellSouth has stated a concern. NuVox based this argument on both applicable facts and law. BellSouth's allegations related to the forty-four circuits do not apply to any other converted EEL circuits used by NuVox in Georgia. (NuVox Post-Hearing Brief, p. 44). In addition, the *Supplemental Order Clarification* permits only limited audits. (Nuvox Brief, p. 44, citing to *Supplemental Order Clarification* ¶¶ 29, 31-32). NuVox argued that permitting BellSouth to audit those circuits for which no concern has been raised would not constitute a limited audit. (NuVox Post-Hearing Brief, p. 44).

The Commission agrees with Nuvox that a limited audit should include only those circuits for which BellSouth has demonstrated a concern. However, the Commission does not entirely adopt NuVox's position on the scope of the audit. The Commission finds that it is reasonable to limit the audit initially to the forty-four circuits. Once the results of this limited audit are examined, the Commission may determine that it is appropriate to expand the scope of the audit to the other converted circuits.

D. The auditor's access to CPNI in BellSouth's possession should be limited to those instances in which BellSouth obtains the approval of the carriers to whom the information pertains.

BellSouth requested that the Commission clarify that it is authorized to provide the auditor with records in BellSouth's possession that contain proprietary information of another carrier. BellSouth's concern was based on a comparison of NuVox records with its own records. It is possible that a customer for which NuVox has certified that it is the exclusive provider of local exchange service is also receiving this service from another carrier. The policy reason behind BellSouth's request, therefore, is that examination of these records is necessary to uncover any additional violations. (BellSouth Petition, p.3). The legal basis BellSouth offers in support of its request is that 47 U.S.C. § 222(e)(1) authorizes BellSouth to release customer proprietary network information ("CPNI") with the approval of other parties or if required by law. *Id.* at 3.

The determination of the scope of the audit disposes of BellSouth's policy argument because the Commission limited the audit to the forty-four converted circuits for which BellSouth stated a concern. The Staff recommended that the Commission reject BellSouth's legal argument. The federal statute prohibits the release of CPNI, with certain exceptions. The

exceptions in 47 U.S.C. § 222(c)(1) provide that CPNI may be released with the approval of the customer or if required by law. BellSouth is not required by law to release this information to its auditor; but rather it is requesting authorization from the Commission to do so. It does not appear consistent with the intent of the law to authorize release of the information in this instance. The Staff recommended that BellSouth only be permitted to release the CPNI with the customer's approval.

The Commission adopts the Staff's recommendation with respect to the release of CPNI to BellSouth's auditor.

E. The auditor proposed by BellSouth must be compliant with with the standards and criteria established by the American Institute of Certified Public Accountants.

The *Supplemental Order Clarification* requires that audits must be conducted by independent third parties paid for by the incumbent local exchange provider. (*Supplemental Order Clarification*, ¶ 1). The Agreement includes the following language on BellSouth's audit rights:

BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] record not more than on[c]e in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements.

(Agreement, Att. 2, § 10.5.4).

This language does not specifically address the issue of the independence of the auditor. BellSouth maintained that it is not required to use a third party independent auditor. It supported this position with the same argument that it used to support its position on the "concern" requirement. That is, BellSouth argued that "the only audit requirement to which the parties agreed is that BellSouth give 30-days' notice." (BellSouth Post-Hearing Brief, p. 3). NuVox disagreed, and argued that the parties did not exempt BellSouth from its obligation to conduct an audit using an independent third party auditor. (Tr. 253). This question of contract construction poses the same question as was addressed with the concern requirement. The Agreement does not expressly state either that BellSouth must show a concern or that BellSouth does not need to show a concern.

The Staff recommended that the Commission find that the *Supplemental Order Clarification* and the Agreement require that the audit be conducted by an independent third party auditor. For the reasons discussed in the analysis of the "concern" issue, the Commission adopts Staff's recommendation that the Agreement is unambiguous that the audit is required to be conducted by an independent third party.

The next question is whether the auditor selected by BellSouth is independent. NuVox vigorously objected to the Hearing Officer's conclusion that ACA satisfied this request. NuVox

argued that ACA is a small consulting shop that was dependent on ILECs for its business, and therefore could not be characterized as independent. (NuVox Post-Hearing Brief, p. 46). NuVox also claims that ACA marketing material characterizing as "highly successful" its audits that have recovered large sums for ILEC clients reflects a bias. *Id.* NuVox also complained that BellSouth's witness, Ms. Padgett admitted that she had private conversations with ACA regarding the requirements set forth in the *Supplemental Order Clarification*, before and during ongoing audits, with and without the audited party being present. (NuVox Objections, p. 19). NuVox reasons that this illustrates that ACA is subject to the influence of BellSouth. *Id.* NuVox requested that BellSouth conduct the audit using a nationally recognized accounting firm. (NuVox Post-Hearing Brief, p. 47). NuVox also contested the auditor's independence on the ground that ACA is not certified under the standards established by the AICPA. (Tr. 275).

BellSouth argues that none of these points demonstrate that ACA is not independent from BellSouth. (BellSouth Post-Hearing Brief, pp. 27-28). BellSouth counters NuVox's claims with evidence that ACA has competitive local exchange carrier clients and that BellSouth has not previously hired ACA. *Id.* BellSouth also argues that neither the Agreement nor the *Supplemental Order Clarification* required the auditor to comply with AICPA standards. *Id.* at 28.

The *Triennial Review Order*, which the FCC issued after the date of the Agreement, states that audits must be conducted pursuant to the standards established by the AICPA. (*Triennial Review Order*, ¶ 626). The question then is whether this compliance is required for audits conducted pursuant to agreements entered into prior to the issuance of the *Triennial Review Order*. NuVox's position that it should be required is based on a reading that, like with the "concern" requirement, the FCC was simply clarifying in the *Triennial Review Order* what was intended by the term "independent" in the *Supplemental Order Clarification*. (Tr. 276). BellSouth argues that the *Triennial Review Order* does not impact the parties' rights under the Agreement, and in fact, illustrates that the *Supplemental Order Clarification* did not contain this requirement. (BellSouth Post-Hearing Brief, FN 7).

The Staff recommended that the Commission find that BellSouth's auditor met the standards of independence set forth in the *Supplemental Order Clarification*, but that the Commission should consider in its evaluation of the credibility of any audit results whether the audit was conducted pursuant to AICPA standards. The Commission does not adopt the Staff's recommendation. NuVox raised serious concerns about the auditor's independence. The FCC has stated clearly not only that auditors must be independent but that the independent auditor must conduct the audit in compliance with AICPA standards. It is true that this latter standard was not clarified until after the parties entered into the Agreement; however, the parties disputed the meaning of the independent requirement prior to the issuance of the *Triennial Review Order*. NuVox always maintained that for an auditor to be independent it must comply with AICPA standards. (Tr. 275). That the FCC later identified AICPA compliance as a prerequisite of an independent audit supports a conclusion that NuVox was correct. BellSouth's argument that the inclusion of the requirement in the latter FCC Order indicates that it was not present in the former is mistaken in this instance. In the *Triennial Review Order*, the FCC gives no indication that it is reversing any portion of the *Supplemental Order Clarification*. The most logical

construction of the *Triennial Review Order* is that it is clarifying the requirement that had been in place from the prior FCC order.

In reaching this conclusion, the Commission concedes that the *Supplemental Order Clarification* did not expressly state that AICPA compliance was a prerequisite for an auditor to be deemed "independent." In fact, the *Supplemental Order Clarification* does not expound on the criteria to be considered in determining whether a third party auditor is independent. This lack of detail should not be construed to render the "independent" requirement meaningless. Rather, it leaves to the discretion of the Commission what is required to comply with the standard of independence. For guidance in reaching this determination, it is reasonable to look at other orders of the FCC. The *Triennial Review Order* gives clear guidance that compliance with AICPA standards is necessary in order for a third party auditor to be independent. The Commission finds that any audit firm selected by BellSouth itself be compliant with AICPA standards and criteria.

The Commission remains cognizant that parties are capable of negotiating and agreeing to terms and conditions that are different than the specific requirements set forth in the law. The Commission has concluded that the parties did not do so with regard to this provision of the Agreement. Therefore, the issue is whether the federal law at the time the parties entered into the Agreement required third party audits to comply with AICPA standards in order to be deemed independent. For the reasons discussed, the Commission concludes that it is a fair construction of the term "independent" to require AICPA compliance.

Regardless of whether BellSouth argues it has a contractual right to conduct an audit that does not comply with AICPA standards, as the finder of fact the Commission may decide the proper weight to afford the findings of any such audit. In light of the FCC's determination that audits should be conducted pursuant to AICPA standards, the Commission concludes that it would not afford any weight to findings from an audit that was not conducted in compliance with AICPA standards. Given that BellSouth would not be able to convert loop and transport combinations to special access services until it prevailed before the Commission, it would not make any difference if the Commission were to permit BellSouth to conduct the audit with an auditor that was not AICPA compliant. As discussed above, the Commission has concluded that BellSouth does not have this right under the Agreement; however, it is important to distinguish between the parties' arguments concerning their respective contractual rights and the Commission's discretion in evaluating the evidence.

The Staff recommended that NuVox should not have to pay the costs related to adherence to AICPA standards. The Commission agrees. The Recommended Order appeared to base the conclusion that NuVox should pay for compliance with AICPA standards on the premise that such compliance was above and beyond what had been agreed to by the parties. Given the conclusion that AICPA compliance is required by the Agreement, the basis for making NuVox pay no longer exists.

F. NuVox's Request for a Stay is denied.

NuVox requested that, should the Commission permit BellSouth to proceed with the audit, that it stay the effect of the order under O.C.G.A. § 50-13-19(d) pending the outcome of any judicial review. NuVox argues that it would be irreparably harmed if BellSouth were to proceed, that it has a likelihood of success on the merits, and that BellSouth would not be harmed if a stay was granted because if NuVox did not prevail on appeal, the time during the stay of the order would not be precluded from the audit. (NuVox Objections, p. 22). BellSouth responds that O.C.G.A. § 50-13-19(d) is inapplicable as it only applies to final orders. (BellSouth Petition, p. 11). BellSouth also argues that NuVox has not shown either that it will be irreparably harmed if the audit is allowed to proceed or that it has a likelihood of success on the merits in an appeal.

The Staff recommended that the Commission deny the requested stay. The Commission adopts Staff's recommendation. The Commission agrees with BellSouth that NuVox has not shown that it will be irreparably harmed if the audit is allowed to proceed because it could recover its out of pocket expenses should it prevail. Moreover, BellSouth will have to come back before the Commission with the findings from its audit prior to converting combinations of loop and transport network elements to special access services. In addition, NuVox has not demonstrated that it has a likelihood of success on appeal. The issue of whether BellSouth has demonstrated a concern is a question of fact, and the Commission's determination is entitled to deference on such an issue. Finally, the limited scope of the approved audit reduces any harm that NuVox can claim as a result of the Commission's decision.

IV. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues presented to the Commission for decision should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to the terms of the parties' interconnection agreements, the Federal Act and the State Act.

WHEREFORE IT IS ORDERED, that BellSouth was obligated pursuant to the terms of the parties' Agreement to demonstrate a concern prior to conducting an audit of NuVox's records in order to confirm that NuVox is complying with its certification that it is the exclusive provider of local exchange service to its end users.

ORDERED FURTHER, that BellSouth demonstrated a concern that NuVox was not the exclusive provider of local exchange service to the end users served via the forty-four converted EELs at issue.

ORDERED FURTHER, that to the extent the Recommended Order concludes that BellSouth was providing service to EELs for which NuVox has contended it is the exclusive provider, that finding is modified to state that BellSouth has provided evidence indicating that it may be providing such service.

ORDERED FURTHER, that BellSouth provided adequate notice, pursuant to the Agreement, of its intent to audit.

ORDERED FURTHER, that the scope of BellSouth's audit shall be limited to the forty-four circuits for which BellSouth demonstrated a concern. Once the results of this limited audit are examined, the Commission may determine that it is appropriate to expand the scope of the audit to the other converted circuits.

ORDERED FURTHER, that the auditor's access to CPNI in BellSouth's possession should be limited to those instances in which BellSouth obtains the approval of the carriers to whom the information pertains.

ORDERED FURTHER, that any audit firm selected by BellSouth must be compliant with AICPA standards and criteria.

ORDERED FURTHER, that NuVox does not have to pay for any costs related to bringing an auditor into compliance with AICPA standards.

ORDERED FURTHER, that NuVox's request for a stay is hereby denied.

ORDERED FURTHER, that except as otherwise stated the Recommended Order of the Hearing Officer is adopted.

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

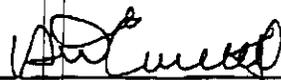
ORDERED FURTHER, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 18th day of May, 2004.



Reece McAlister
Executive Secretary

Date: 6-29-04



H. Doug Everett
Chairman

Date: 06-29-04